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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL McDOWELL, Defendant and Appellant.	B215092 (Los Angeles County Super. Ct. No. NA078930)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary J. Ferrari, Judge. Affirmed with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Michael McDowell appeals from the judgment entered following the trial court's order revoking his probation. Appellant pled nolo contendere to count 1, assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1));[1] count 5, making criminal threats (§ 422); and count 6, dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)).[2] The trial court suspended imposition of sentence and placed appellant on probation. On March 25, 2009, the trial court held a probation violation hearing and determined that a violation had occurred. The trial court revoked appellant's probation and imposed the suspended four-year sentence on count 1 and concurrent two-year sentences for counts 5 and 6.

Appellant contends that: (1) the trial court erred in failing to stay one of the concurrent sentences imposed for count 5 or count 6 pursuant to section 654; and (2) the abstract of judgment must be corrected to accurately describe the count 1 offense.

We affirm with directions to the trial court to correct the abstract of judgment.

FACTS AND PROCEDURAL HISTORY

The following facts of the crimes alleged were derived from the preliminary hearing. As to count 1, on June 30, 2008, James Welch (Welch), the manager of the Sober Living facility in Long Beach, received a telephone call from appellant. Appellant was a resident at the Sober Living facility. Welch hung up because appellant was "mumbling about a [lot] of stuff." Appellant called back and left a message on Welch's answering machine saying that he would blow up the building, slash Welch's tires, and "mess up" Welch and his boss.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Counts 2 and 4 for making criminal threats in violation of section 422, were dismissed pursuant to the plea negotiations. Count 3 was dismissed at the preliminary hearing.

As to count 5, on July 1, 2008 at 1:30 a.m., Robert Macias (Macias), another resident at the Sober Living facility, woke up to find appellant sitting inside the living room area. Appellant told Macias that if Macias did not get his money back from Dee Cliburn (Cliburn), he was going to burn the building down. Appellant also told Macias he would kill him if he told anyone that appellant was back inside the Sober Living facility.

As to count 6, on July 3, 2008, Macias heard a knock at the door of his apartment at the Sober Living facility. Two African-American men were at the door. They told Macias that appellant had given them the green light on Macias and that they wanted to get a good look at him. They said if he reported anything to the police or testified against appellant, he would not "see the light at the end of the tunnel."

Evidence of other incidents was presented at the preliminary hearing as follows: On June 30, 2008, appellant choked Macias until he blacked out, because he thought Macias had stolen his DVDs. When Macias regained consciousness, appellant threatened to kill Macias if he reported him. On July 2, 2008, appellant met with his psychiatric social worker, Ming Ngoun Harrison (Harrison) and told her that he was going to "attack and whack" his apartment manager, Cliburn. Harrison called Cliburn to report the threat.

On September 2, 2008, appellant pled nolo contendere. The trial court suspended imposition of sentence and placed appellant on probation. On March 25, 2009, the trial court found appellant in violation of probation because he threatened two hospital social workers on October 20, 2008 and October 23, 2008.

DISCUSSION

I. The trial court did not err in refusing to stay either of the concurrent sentences imposed for counts 5 and 6 pursuant to section 654

Appellant claims that the sentence for count 5 or count 6 should be stayed pursuant to section 654 because both count 5 and count 6 involve a continuous and indivisible course of conduct with the objective of frightening Macias so he would not alert authorities to appellant's June 30, 2008 assault on Macias. We disagree.

Section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

The protection of section 654 has been extended to cases where a single act or omission has occurred, or where there are several offenses committed during a course of conduct deemed to be indivisible in time. (*People v. Le* (2006) 136 Cal.App.4th 925, 931-932.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The defendant may be found to have harbored a single intent if the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, resulting in the defendant being punished only once. (*Ibid.*) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*) Whether the facts reveal a single objective is a factual matter; the meaning of section 654 is a legal matter. (*People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. [Citation.]" (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Appellant argues that by its nature a threat designed to dissuade a witness pursuant to section 136.1, subdivision (b)(1)[3] can constitute a threat for purposes of section 422.[4]

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[3] Section 136.1, subdivision (b)(1) criminalizes the knowing and malicious prevention or dissuasion of any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

[4] To establish a violation of section 422, the People must prove that: the defendant willfully threatened to commit a crime which will result in death or great bodily injury;

He contends that he engaged in a continuous and indivisible course of conduct beginning with the June 30, 2008 threat to kill Macias if he reported the choking incident to appellant, continuing with the July 1, 2008 threat to kill Macias, and persisting with the threat made by two men on appellant's behalf to kill Macias if he talked to the police.

We disagree. Appellant's two convictions simply did not arise from a single act or during a continuous course of conduct. (Cf. *People v. Mendoza* (1997) 59 Cal.App.4th 1333 [section 654 barred multiple punishment for section 422 and section 136.1, subd. (c)(1) violation where defendant had one objective, to threaten witness to dissuade her from testifying at his brother's trial, arising from the same act of knocking at her door and threatening her].) The events here were independent of each other, involving different actors and occurring on different days. Moreover, appellant's threats against Macias were motivated by specific, separate incidents. The threat on June 30, 2008 was directed to Macias after appellant choked him into unconsciousness because appellant thought Macias had stolen his DVDs. On July 1, 2008, appellant threatened to burn the building down if Macias did not get money from Cliburn. He said he would kill Macias if he told anyone appellant was at Sober Living. On July 3, 2008, Macias was threatened by different men who said that he would be killed if he reported appellant to the police or testified against him. We do not find that these several offenses were committed with the same objective during a course of conduct indivisible in time.

The trial court did not err in imposing concurrent punishment for counts 5 and 6.

II. The abstract of judgment must be corrected

Appellant urges, and the People concede, that the abstract of judgment should be corrected to reflect that appellant was convicted of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), rather than assault with a deadly weapon (§ 245, subd. (a)(1)), a serious felony strike offense (§ 1192.7, subd. (c)(23)).

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the defendant had the specific intent that the statement be taken as a threat, even if there is no intent of actually carrying it out; the threat was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; and the threat caused that person reasonably to be in sustained fear for his or her own safety. (§ 422.)

We agree and modify the abstract of judgment. (*People v. Mitchell* (2002) 26 Cal.4th 181, 188.)

DISPOSITION

The trial court is ordered to correct the abstract of judgment to state that appellant was convicted of count 1, assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The trial court shall forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ